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RSC Policy Brief:
Update on the Florida Obamacare Lawsuit

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Late Tuesday afternoon, the Department of Justice (DOJ) filed their appeal in the 11th Circuit Court of Appeals of Judge Roger Vinson's January 31, 2011 declaratory judgment striking down as unconstitutional the entirety of Obamacare in the case, State of Florida v. U.S. Department of Human Services. This legal challenge is just one of many all over the country making their way through the federal courts, yet it has garnered the most attention. This is because the parties bringing the case include over half of all of the states (26 states), as well as the National Federation of Independent Business and two private individuals. More importantly, however, it is the only legal challenge to date to completely invalidate President Obama's signature health care reform law. This policy brief highlights a few recent updates to this landmark legal challenge, which according to most observers, will undoubtedly be decided by the U.S. Supreme Court sometime in the spring of 2012.

Breaking down the "Motion to Clarify"

Instead of filing a timely appeal or seeking an immediate stay pending an appeal, the federal government waited 17 days to file an "untimely and unorthodox" Motion to Clarify ("Motion") the judgment. While Judge Vinson believed that his order was "as clear and unambiguous as it could be" (i.e., that Obamacare is unconstitutional and void), he granted the federal government's Motion.

He conditioned the Motion upon the federal government appealing his judgment to the 11th Circuit Court of Appeals, or directly to the Supreme Court, within seven calendar days *and* seeking an expedited appellate review because the nation will be "better off" the sooner this issue is finally decided by the Supreme Court. The federal government met these two conditions by filing their appeal and a motion to expedite the case late Tuesday afternoon.

Despite Judge Vinson granting the federal government's Motion and staying his judgment pending appeal, he issued some compelling statements worthy of taking notice:

→ Judge Vinson declared the individual mandate in section 1501 of Obamacare is unconstitutional and cannot be "severed" from the law because of its centrality to the

entire insurance market reform schemes Obamacare created. In deciding the severability issue, he noted:[1]

- "At the time the Act passed, Congress knew for certain that legal challenges to the individual mandate were coming";
- "Congress' own Research Service had essentially advised that the legal challenges would have merit (and therefore might result in the individual mandate being struck down) as it could not be said that the individual mandate had "solid constitutional foundation";
- "And yet, Congress specifically (and presumably intentionally) deleted the 'severability clause' that had been included in the earlier version of the Act."
- "…the conspicuous absence of a severability clause—which is ordinarily included in complex legislation as a matter of routine—could be viewed as strong evidence that Congress recognized that the Act could not operate as intended if the individual mandate was eventually struck down by the courts."

→ Judge Vinson also found the federal government's own arguments in defense of the individual mandate undermined its argument for severability:[2]

- "…the [federal government] consistently and repeatedly highlighted the 'essential' role that the individual mandate played in the regulatory reform of the interstate health care and health insurance markets, which was the entire point of the Act.
- The federal government argued":[3]
    - "[The individual mandate] is essential to the Act's comprehensive scheme to ensure that health insurance coverage is available and affordable [and it 'works in tandem' with the health benefit exchanges, employer incentives, tax credits, and the Medicaid expansion]."
    - "[The absence of an individual mandate] would undermine the 'comprehensive regulatory regime' in the Act."
    - "[The individual mandate] is essential to Congress' overall regulatory reform of the interstate health care and health insurance markets…[it] is 'essential' to achieving key reforms of the interstate health insurance market…[and it is] necessary to make the other regulations in the Act effective."
- "In light of the defendant's own arguments…and dozens of similar representations that they made throughout this case, I had no choice but to find that the individual mandate was essential to, and thus could not be severed from, the rest of the Act."

→ Judge Vinson on the role of the federal judicial branch

- By refraining from legislating from the bench, he expressed that "…because the Act was extremely lengthy and many of its provisions were dependent (directly or indirectly) on the individual mandate, it was improper of me (a judge) to engage in the quasi-legislative undertaking of deciding which of the Act's several hundred provisions could theoretically survive without the individual mandate (as a technical or proper matter) and which could not—or which provisions Congress could have arguably wanted to survive." [4]

[1] Order at page 6.
[2] Order at page 6 &7.
[3] Order at page 7. Memorandum in Support of Defendant's Motion to Dismiss (doc. 56-1), at 46-48 (emphasis added).
[4] Order at page 7.

→ Judge Vinson's reasoning for not granting the States' request for an injunction to halt implementation of Obamacare:[5]

- "…there is a long-standing presumption 'that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction."
- "There is no reason to conclude that this presumption should not apply here [in this case]. Thus the award of declaratory relief is adequate and separate injunctive relief is not necessary."
- Even though this language "seems to be plain and unambiguous…the [federal government] have indicated that they 'do not interpret the Court's order as requiring them to cease [implementing and enforcing the Act]."
- "…the [federal government] expressly assured the court that, in light of the 'long-standing presumption that a declaratory judgment provides adequate relief as against an executive officer, as it will not be presumed that that officer will ignore the judgment of the Court…" which is exactly what the federal government did for 17 days.

→ Judge Vinson highlighting his concern about the powers of Congress:

- "Even the district courts that have upheld the individual mandate seem to agree that 'activity' is indeed required before Congress can exercise its authority under the Commerce Clause. They have simply determined that an individual's decision not to buy health insurance qualifies as activity. For example, in the most recent case, Mead v. Holder,--F. Supp. 2d--,2011 WL611139 (D.C.C. Feb. 22, 2011), the District Court for the District of Columbia concluded that "[m]aking a choice is an affirmative action, whether one decides to do something or not do something," and, therefore, Congress can regulate 'mental activity' under the commerce power."[6]
- "Although I strongly believe that expanding the commerce power to permit Congress to regulate and mandate mental decisions not to purchase health insurance (or any other product or service) would emasculate much of the rest of the Constitution and effectively remove all limitations on the power of the federal government, I recognize that others believe otherwise."[7]
- "…two days after my [January 31, 2011] order was entered, the Senate Judiciary Committee held a hearing to explore the Constitutionality of the individual mandate. The possibility of a "broccoli mandate" was discussed at this hearing. Former Solicitor General and Harvard law professor Charles Fried testified (during the course of defending the Constitutionality of the individual mandate) that under this view of the commerce power Congress could, indeed, mandate that everyone buy broccoli.[8] This testimony only highlights my concern because it directly undercuts the defendants' principal argument for why an economic mandate is justified here."

[5] Order at page 10.
[6] Order at page 3, footnote.
[7] Order at page 15.
[8] Order at page 4 citing Transcript of Senate Judiciary Committee Hearing: Constitutionality of the Affordable Care Act (Feb. 2, 2011).

Key Takeaway

As noted earlier in this briefing, it is widely accepted that the Supreme Court will be the ultimate arbiter of Obamacare's constitutionality in this case (and the other related ones). The question is *when* not *if* the high court weighs in. Many Americans are disappointed that Judge Vinson did not dismiss the federal government's Motion, and therefore, halt implementation of Obamacare in its tracks. His decision to grant a stay leaves many observers pondering how he could initially void the entire law, and then allow it to continue being implemented pending appeal. Some speculate that Judge Vinson figured the 11th Circuit Court of Appeals would have granted the stay of his ruling anyway, and therefore, simply sought to speed up the case.

On the bright side for those who are rooting for a Supreme Court victory, Judge Vinson's makes a strong case for the appeals and high court to affirm his declaratory judgment. At least three-quarters of his order on the federal government's quixotic Motion clarified his opinion to the question at issue: the individual mandate is unconstitutional and so is the entire government takeover of our health industry.

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